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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RIGOBERTO RAMIREZ,

Defendant and Appellant.

D060767

(Super. Ct. No. JCF26806)

APPEAL from a judgment of the Superior Court of Imperial County, Poli Flores, Jr., Judge. Reversed.

A jury convicted Rigoberto Ramirez of violating former Penal Code<sup>1</sup> section 12020, subdivision (a)(4), which prohibits the carrying of a concealed dirk or dagger, a

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<sup>1</sup> Subsequent unspecified statutory references are to the Penal Code. Effective in 2012, several code sections relevant to this case have been renumbered, without substantive change. In particular, former section 12020, subdivision (a)(4) is now section 21310, and section 12020, subdivision (c)(24), defining "dirk" or "dagger" for these

felony (count 2). He was also found guilty of possession of burglary tools, a misdemeanor (§ 466, count 3). He was acquitted of residential burglary (§ 459, count 1). The court found true allegations that he had a prior strike conviction (§ 667, subds. (b)-(i)), and had served a prior prison term (§ 667.5, subd. (b)).

The trial court sentenced Ramirez to five years in state prison, composed of a two-year midterm for the concealed dagger count, doubled by the strike, and a one-year prior prison term enhancement. A prison term for the misdemeanor burglary tools count was imposed to run concurrently, apparently as a doubled felony term (two years).

On appeal, Ramirez asserts his conviction of carrying a concealed dirk or dagger should be reversed because (1) it is not supported by sufficient evidence of any intentional concealment; and (2) that statute violates the United States Constitution, Second Amendment constitutional right to bear arms for self-defense.

As to sentencing, Ramirez contends, and the People concede, the court's concurrent sentence on the possession of burglary tools count (for one or two years), was erroneous for a misdemeanor and must be corrected, because only a maximum six-month concurrent county jail sentence was authorized by sections 19 and 466. Additionally, Ramirez argues he was entitled to 119 additional days of presentence conduct custody credit, due to a recent amendment to section 4019 that should arguably be applied under equal protection principles. (U.S. Const., 14th Amend.; but see *People v. Brown* (2012)

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purposes, is now section 16470. For convenience, we eliminate the term "former" when referring to these related statutes.

54 Cal.4th 314, 328-330 [ruling otherwise on the same equal protection argument; Ramirez pursues this argument solely to exhaust his state remedies].)

Our review of the record leads us to conclude that Ramirez is correct in his main assertion, that insufficient evidence supports the jury conviction for carrying a concealed knife, and double jeopardy protections prevent any retrial of that charge. (*Burks v. United States* (1978) 437 U.S. 1, 11; *People v. Hatch* (2000) 22 Cal.4th 260, 271-272.) We reverse that conviction on count 2, and modify the judgment on count 3 (burglary tools possession) by reducing it to a concurrent six-month county jail sentence as authorized by sections 19 and 466. We remand the matter to determine any remaining sentencing issues. We need not address Ramirez's constitutional claims under the Second Amendment nor his presentence custody credit arguments. (But see *People v. Mitchell* (2012) 209 Cal.App.4th 1364 (*Mitchell*) [rejecting such 2d Amend. arguments].)

## FACTUAL AND PROCEDURAL BACKGROUND

### *Facts Presented to Jury*

At 11:41 p.m. on February 26, 2011, Calexico Police Officer Peter West and another officer were dispatched to the Lincoln Street single-family residence of Consuela Paz, her husband and her mother, after Paz called police to say she heard noises in her back room. When Paz met the responding officers, they found that the back sliding door of the house was open. Paz looked through the open blinds at the back of her house and saw a person's silhouette as that person jumped the back fence. She could tell that the

person jumping the fence was wearing a jacket and beanie and was carrying a flashlight. There were dirty footprints that looked new on a rug near the back door.

Paz's Lincoln Street residence backed onto houses on Grant Street, which ran parallel to Lincoln. Police officer Abram Sanchez, driving a patrol car that did not have full police equipment, was responding to the dispatch report of a burglary on Lincoln Street. Going toward Grant Street, he heard the dispatcher report that a male was seen leaving the back of the Paz residence. Sanchez turned onto Grant Street and saw Ramirez running from sidewalk to sidewalk there, coming from the direction of Lincoln Street, with his right side facing into the dark part of the area. Ramirez was wearing a thick jacket, some kind of pants and gloves.

As Officer Sanchez approached him, Ramirez stopped and turned to face him, seeming to stick his chest out while holding his hand below his right hip, towards his back. Suddenly, Ramirez recognized him from a previous encounter and yelled out, "Sanchez!" Sanchez got out of his patrol vehicle, without being able to see whether Ramirez was doing anything with his hands or whether they were empty. Sanchez then heard a "clang" as something must have hit the street, although he did not see Ramirez throw anything.

Sanchez detained Ramirez and Sgt. Victor Legaspi arrived at the scene a few minutes later. Sanchez looked around and found a knife, a long solid blade with a handle, lying on the street about six feet away from where Ramirez was sitting. Officer Sanchez gave the knife to Sgt. Legaspi, who showed it to Ramirez. Ramirez told

Sergeant Legaspi that the knife was his and that he threw it to the ground before Officer Sanchez showed up.<sup>2</sup>

When detained, Ramirez was wearing approximately five layers of clothing, including two dark jackets, a sweater or sweatshirt with hood, a shirt, pajama pants over jeans, gloves and a gray beanie over a black hat. Sgt. Legaspi later testified that based on his training and experience investigating burglaries, he knew that burglars often wore many layers of clothing in order to change their clothing to disguise themselves, in case of later detention.

When detained, Ramirez had in his pockets two screwdrivers (one with a shaved tip) and a pry bar, items that are commonly used as burglary tools.

Paz was taken by officers to the place where Ramirez was detained, and they told her she would be viewing a suspect, but simply because someone had been detained, that did not mean that individual was the person who had broken into her house or jumped over her back fence. Paz told Officer West that she had not seen the suspect's face, but Ramirez was wearing the same beanie and jacket as the person she saw going over her back fence. At trial, Paz testified that she had not been wearing her contact lenses when she saw the silhouette of someone going over the fence, or at the scene of the suspect's detention, but she testified that the person who was detained was wearing a beanie and jacket that looked like those being worn by the person who jumped over her back fence.

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<sup>2</sup> Ramirez later brought a motion to suppress statements he made to Sgt. Legaspi, and it was denied.

Ramirez was wearing shoes when he was detained, and they were found not to match the dirty shoe prints found on the rug near the rear door of Paz's house. Although some items in her back room had been moved around, nothing was missing.

At the police station, Ramirez waived his *Miranda*<sup>3</sup> rights and talked to Officer West, although Ramirez at times nodded off and seemed to be under the influence of drugs. Ramirez admitted to Officer West that he had a knife when he entered the Paz house, for robbing the residents and for protection, in case anyone "got in his face." He brought along screwdrivers when he entered the house and he used screwdrivers for burglaries. Ramirez told Officer West he would say that he committed the burglary in order to get some help for his heroin addiction.

#### *Jury Verdict and Sentence*

During deliberations, the jury sent out a question about the definition of "concealed," and requested a readback of the testimony of Officer Sanchez about the dagger. The court allowed the readback and referred the jury to the instructional language already given, CALCRIM No. 2501. In relevant part, this instruction required the People to prove that the defendant had knowingly carried on his person a dirk or dagger, substantially concealing it on his person.

The jury then rendered a verdict acquitting Ramirez of burglary but convicting him of carrying a concealed dagger. (§12020, subd. (a)(4).) The jury also found that he

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<sup>3</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

possessed burglary tools within the meaning of section 466. After the jury's verdict, the court found true the prior prison term allegation and a prior strike allegation.

At sentencing, the court denied Ramirez's requests to reduce the felony charge to a misdemeanor, or to strike the prior conviction. (§§ 17, subd. (b); 1385.) The court sentenced him to five years in prison, consisting of four years for the offense of carrying a concealed knife (double the two-year middle term, pursuant to his strike prior) and one year for the prison prior. (§ 667, subds. (b)-(i); § 667.5, subd. (b).) Although the record is somewhat unclear, the court imposed a concurrent prison term for the burglary tools count, for two years as doubled, even though the burglary tools count was a misdemeanor. Ramirez appeals.

## DISCUSSION

### I

#### *STANDARDS FOR REVIEWING SUFFICIENCY OF EVIDENCE*

In evaluating a claim of insufficient evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, italics omitted; *People v. Rowland* (1992) 4 Cal.4th 238, 269.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable

trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

As explained in *People v. Rubalcava* (2000) 23 Cal.4th 322, 331-332, section 12020, subdivision (a)(4) does not require that the defendant intend to use the concealed dirk or dagger as a stabbing instrument. However, "a defendant must still have the requisite guilty mind: that is, the defendant must *knowingly and intentionally carry concealed upon his or her person* an instrument 'that is capable of ready use as a stabbing weapon.' " (*Id.* at p. 332, italics added; see *Mitchell, supra*, 209 Cal.App.4th 1364, 1371-1372.)

Ramirez was presumed innocent at trial. (§ 1096.) A defendant has a constitutional right to have the jury determine every material issue presented by the evidence. (*People v. Costa* (1991) 1 Cal.App.4th 1201, 1208.) The jury was required to decide under CALCRIM No. 2501 whether he had not only carried a dagger on his person, but while doing so, had knowingly and substantially concealed it upon his person.

"[E]vidence that merely raises suspicion, no matter how strong, of the guilt of a person charged with a crime is not sufficient to sustain a verdict and judgment against him." (*People v. Draper* (1945) 69 Cal.App.2d 781, 786.) Speculation and conjecture are not the equivalent of substantial evidence. (*Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal.App.3d 1574, 1584 (*Louis & Diederich, Inc.*).) Nor is the absence of evidence equivalent to substantial evidence. (*Roddenberry v.*



*Roddenberry* (1996) 44 Cal.App.4th 634, 655.) "A theoretical possibility is not the equivalent of substantial evidence." (*Id.* at p. 646.)

In reviewing this record, we are mindful that (1) Ramirez was acquitted on the burglary count, (2) he does not challenge the sufficiency of the evidence regarding his possession of burglary tools, but (3) he argues no substantial evidence was produced to show he knowingly and intentionally concealed the knife on his person. We may consider the evidence on the different charges individually for assessment of his sufficiency of the evidence arguments. (*People v. Avila* (2006) 38 Cal.4th 491, 600 ["As a general rule, inherently inconsistent verdicts are allowed to stand. [Citation.] For example, 'if an acquittal of one count is factually irreconcilable with a conviction on another, or if a not true finding of an enhancement allegation is inconsistent with a conviction of the substantive offense, effect is given to both.' "]; *People v. Abilez* (2007) 41 Cal.4th 472, 512-513.)

## II

### *APPLICATION OF STANDARDS*

#### A. Elements of Knife Concealment Offense

Section 12020 stated: "(a) Any person in this state who does any of the following is punishable by imprisonment in a county jail not exceeding one year or in the state prison: [¶] . . . [¶] (4) *Carries concealed upon his or her person any dirk or dagger.*" (Italics added.) With regard to the physical evidence at trial, there is no contention here that the knife found on the street did not qualify under the definitions of section 16470, as

a "dirk" or "dagger" "that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death. . . ."

Rather, Ramirez is arguing there was an absolute dearth of evidence that he *knowingly and intentionally carried, concealed upon his person*, the knife that was later found on the ground. (See *Mitchell, supra*, 209 Cal.App.4th 1364, 1371-1372.)

#### B. Insufficient Evidence Produced to Show Substantial Concealment

When Paz saw the person jumping over her back fence, she could see he was carrying a flashlight, but she could not see anything else in his hands or on his person, except his jacket and beanie, and she was not sure whether those were the same clothes as Ramirez wore when she looked at him, after he was detained. She gave no evidence regarding a knife.

While in detention, Ramirez told Sgt. Legaspi that he owned the knife that was found, but he did not describe how he carried it. Ramirez also told Officer West it was his knife, but he did not say anything about where or how he carried it. There is no contention that these facts include the circumstances described in section 20200, that "[a] knife carried in a sheath that is worn openly suspended from the waist of the wearer is not concealed within the meaning of [this prohibition; e.g., former section 12020]."

In any event, only Officer Sanchez was in a position to give evidence on whether the knife was produced from a concealed position or if it was openly carried, before it hit the ground. However, Sanchez's testimony forthrightly admitted that he did not see

Ramirez's hands holding a knife or Ramirez otherwise bearing the knife upon his body, before Ramirez stopped running and was detained:

"Q: [W]hen he was running, his left side was facing you; is that correct?

"A: Running, yes.

"Q: So if he had the knife in his right hand, his right side would be away from you; correct?

"A: Yes.

"Q: In other words, you wouldn't be able to see what he's doing on the right hand side of his body; is that correct?

"A: Correct.

Sanchez went on to testify:

"Q: And at any point were you able to see both of his hands as he was running towards you?

"A: I only saw the left side. It was dark on the right side."

Once Officer Sanchez confronted Ramirez, he could see that Ramirez was holding his right hand below his right waist area towards the rear of his body, but Sanchez could not see what he was doing with his hands, as follows:

"Q: Did you see him turn at some point?

"A: Yes.

"Q: When he turned, did it appear his hand was -- where did it appear his right hand was?

"A: On the side of his hip."

He also testified:

"A: As I was approaching the subject running, the person that was running, he turned, and he turned and look[ed] at me and then turned around and went like this.

"Q: By "this" you are kind of sticking your chest out. Is that what this person did?

"A: With his hand like that. [Later characterized for the record, as holding the right hand below the right waist area towards the rear of the body].

"Q. [THE PROSECUTOR]: And then what happened?

"A: I then exited my vehicle. And as soon as I opened the door and I stepped out one foot, I heard like a clang or a — something hit the street.

"Q: And did you see the person do anything, any hand motions?

"A: He just yelled out, 'Sanchez.'

"Q: Did you see him do anything with his hands?

"A: No."

Sanchez further testified:

"Q: You never saw Mr. Ramirez throw anything; correct?

"A: Correct."

After hearing the sound of something hitting the street, Sanchez found the knife nearby. The prosecutor took the position that the jury could assume or believe Ramirez must have been concealing the knife within his layers of clothing before it hit the ground. She also relied on Ramirez's admissions to other officers that he owned the knife. On appeal, the Attorney General makes similar arguments, relying on a single page of

Officer Sanchez's testimony to argue the officer "saw nothing in appellant's hands," and claiming it can thus reasonably be inferred that Ramirez must have concealed the knife on his person while presumably intruding into Paz's home (of which he was acquitted), and while running away.

The jury was obviously interested in questioning the definition of "concealed," and they requested a readback of the testimony from Officer Sanchez about the knife, which was given. The court merely referred the jury to the instructional language already given, CALCRIM No. 2501, which did not really answer its question. On the entire record, the evidence presented was not sufficient to eliminate any reasonable doubt that Ramirez had been carrying the knife openly or legally in his gloved hand, or he had only partially, not substantially, concealed it in his clothing. For example, he could have been carrying it with a portion sticking out of his waistband or pocket, on the side Sanchez could not see, before he admittedly tossed it away.

When we review the evidence, we find it only amounts to a showing of possibilities that Ramirez could have substantially concealed the knife among his clothing items, which does not constitute substantial evidence, beyond a reasonable doubt, that he violated section 12020, subdivision (a)(4) by knowingly and intentionally carrying the knife by concealing it upon his person. (*People v. Rubalcava, supra*, 23 Cal.4th 322, 331; *People v. Johnson, supra*, 26 Cal.3d 557, 577-578.)

Evidence Code section 600, subdivision (b) provides: "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group

of facts found or otherwise established in the action." We accept the reply brief's argument that even though Ramirez "kept burglary tools in his pocket [it] does not mean that he kept the knife in his pocket and [it] certainly does not mean that he substantially concealed the knife in his pocket as opposed to complying with the law and allowing at least part of the handle to protrude." As stated in *Louis & Diederich, Inc., supra*, 189 Cal.App.3d at pages 1584 through 1585: "An inference must be the product of logic and reason. It must rest on the evidence, on probability rather than on speculative possibility or conjecture." Those tests were not satisfied here.

"The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." (*Burks v. United States, supra*, 437 U.S. 1, 11.) Because of the failure of proof, the conviction on count 2 must be reversed and retrial is barred. (*People v. Costa, supra*, 1 Cal.App.4th 1201, 1208.)

### III

#### *SENTENCE CORRECTION: BURGLARY TOOLS*

" '[W]hen the trial court pronounces a sentence which is unauthorized by the Penal Code that sentence must be vacated and a proper sentence imposed whenever the mistake is appropriately brought to the attention of the trial court or the reviewing court.' " (*People v. Ross* (1994) 28 Cal.App.4th 1151, 1160.)

Under section 19, a misdemeanor offense is normally punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding \$1,000, or by both.

Here, the People correctly concede the sentence imposed on count 3, section 466, a misdemeanor, was excessive, and the matter should be remanded to the trial court for imposition of a proper six-month jail term, running concurrently, subject to credit for time served. In light of our reversal of the only other count on which a conviction was obtained, we modify the judgment in this respect and order the superior court to conduct appropriate resentencing procedures.

#### DISPOSITION

The conviction on count 2 is reversed and its corresponding sentence is vacated; the judgment on count 3 (burglary tools possession) is modified to reduce its term to a six-month county jail sentence, as authorized by sections 19 and 466. We remand the matter to the trial court to determine any remaining sentencing issues, including credits.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.